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No. 87-1621

In The
Supreme Court of the United States
October Term, 1987

UNITED STATES INTERNAL REVENUE SERVICE and BUREAU OF ECONOMIC ANALYSIS, UNITED STATES DEPARTMENT OF COMMERCE,

Petitioners,

v.

SUSAN B. LONG and PHILIP H. LONG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STEPHEN K. STRONG
Counsel for Respondents

BENDICH, STOBAUGH & STRONG
2010 Smith Tower
506 Second Avenue
Seattle, WA 98104
(206) 622-3536

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

The questions presented are:

1. Should the petition be denied because the IRS expressly and voluntarily agreed to release the information it now seeks to withhold?

2. Was the petition timely, where the IRS waited until more than 90 days after judgment and the finality of that judgment was not suspended by Respondents' petition for partial rehearing in a separate appeal?

3. Does the Court's recent decision in *Church of Scientology v. IRS*, involving a request for records in files on identified specific taxpayers, prevent disclosure of records from an IRS statistical sample?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose the petition for writ of certiorari and the summary action requested by IRS. Certiorari should be denied because (a) the IRS expressly and voluntarily agreed to the disclosure it now seeks to avoid, (b) the IRS petition is not timely, and (c) the Court's recent *Church of Scientology* decision does not bar release of the records at issue here.

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STATEMENT OF FACTS

Respondent Susan Long is a professor at Syracuse University and an expert on tax policy and tax research. RT 128-34, P.Ex. 132(a)—(k).[1] She has many publications based on her tax research. See, *e.g., The Internal Revenue Service: Measuring Tax Offenses and Enforcement Response,* a book published in 1980 by the National Institute of Justice of the U.S. Department of Justice, P.Ex. 132(e). Dr. Long and her husband brought suit under the Freedom of Information Act in 1975 to obtain statistical data compiled in an IRS research program known as the Taxpayer Compliance Measurement Program (TCMP).

The TCMP is a series of scientific surveys which compile statistical data in an effort to answer fundamental tax policy questions concerning matters such as long range goals, appropriation requests and proposals for changes in the tax laws. The program was established in 1962 "as

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[1] "RT" refers to the Reporter's Transcript. "P.Ex." refers to plaintiff's trial exhibits.

a scientific research system" to provide a data base for long range planning of tax administration and policy. IRM Supp. July 2, 1962, P. Ex. 157. The purposes of the TCMP were summarized by IRS as follows (IRM § 125(18).1, P.Ex. 157):

> (1) The Taxpayer Compliance Measurement Program (TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of limited resources can be evaluated.
>
> (2) In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to improve the efficiency and effectiveness of existing operations in terms of such matters as allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, budget requests, and general tax administration policy and systems.

The TCMP includes various types of surveys covering different types of taxpayers (individual, small corporation, exempt organizations, etc.) Each type of survey is known as a "phase". Dr. Long sought survey records from Phase II (non-farm businesses that failed to file returns), Phase III (individual returns), and Phase IV (small corporation returns). CR 412 at 3-4.[2] For each survey the IRS selected a random sample of returns for intensive audits to determine each return's accuracy or, in the case of Phase II (delinquent business nonfilers), an audit to determine whether a business should have filed a tax return. The TCMP survey information is entered on forms known as "check sheets" which contain information about the re-

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[2] "CR" refers to the Clerk's Record.

ported tax (if any), summaries of income and deductions, the schedules and forms that should have been filed, and the corrected actual tax due. The survey data are then developed into statistically accurate models and placed on computer tapes which can be used by statisticians to represent the total population. These TCMP statistical models are excellent research tools and are thus "extremely useful in formulating tax policy and evaluating current practices.' *Long v. IRS*, 596 F.2d 362, 364, 369 (9th Cir. 1979); *Long v. BEA*, 646 F.2d 1310, 1314 n. 1 (9th Cir. 1981).

The TCMP statistical compilations at issue here are from Phase II, a survey conducted in 1963, 1966 and 1969. CR 412 at 3-4. The purpose of these business nonfiler surveys was to determine the overall tax significance of the non-farm businesses' failure to file tax returns and identify the characteristics of business nonfilers. P.Ex. 133(b) and (s); P.Ex. 157, § 2.05 (IRM Supp.) Each survey took about three years to complete. P.Ex. 133(a), (b) and (c).

Susan Long began seeking access in 1972 to TCMP statistical compilations, including the Phase II surveys. After unsuccessfully pursuing administrative remedies, she filed this case in 1975. The district court ruled in 1976 that Susan Long could have access to statistical tables from TCMP, but she could not receive the compilations of data from which the tables were prepared. The court of appeals reversed, holding that TCMP data compilations were disclosable in either computer tape or check sheet form, without taxpayer identifying information. 596 F.2d 362 (9th Cir. 1979). The Court noted that the computer tapes were primarily sought, but check sheets might be necessary to interpret the tapes. 596 F.2d at 364, 366.

The IRS petitioned for certiorari, raising a new issue concerning harm to audit selection procedures if some TCMP data were disclosed. The IRS made no argument relating to the Phase II business nonfiler data compilations at issue here, since these surveys were not used in development of audit selection formulas. The Court denied certiorari. 446 U.S. 917 (1980).

On remand the IRS specifically agreed to release the Phase II TCMP statistical data. Pretrial Order, CR 412 at 6. In July, 1981, the IRS provided 23 computer tapes containing Phase II data to Dr. Long. *Id.*

After working with the 23 tapes, Dr. Long found they were not usable because of inadequate documentation to explain how the statistical data are arranged on the tapes. RT 495. At trial in 1983 the IRS agreed that some Phase II files were not provided on tapes and, moreover, there were problems with interpreting all the Phase II computer tapes. Petition App., p. 4a; 825 F.2d at 227-28. Dr. Long therefore sought copies of check sheets in order to interpret the computer tapes she had received, and the district court found the "IRS voluntarily agreed to disclose that [Phase II] data." Finding No. 17, Petition App., p. 33a. The district court dismissed the case, although the IRS had not yet provided the check sheets.

Susan Long appealed, stating the IRS was still not releasing the Phase II check sheets, despite its agreement to disclose Phase II survey data, and she sought another order requiring the IRS to make them available. Petition App., p. 3a; 825 F.2d at 227. The IRS responded by stating that the trial court's action "did not constitute a denial of access to the check sheets." IRS Br., No. 84-4117, p. 31.

IRS stated only that Dr. Long had a responsibility to pay copying charges, *id.* at 30 n.14. The court of appeals therefore ordered the IRS to comply with its agreement to release the check sheets. Petition App., p. 5a; 825 F.2d at 228.

In its petition for certiorari, the IRS seeks a remand for reconsideration of the order requiring IRS to comply with its voluntary agreement to release the Phase II check sheets to assist Dr. Long interpreting the computer tapes IRS already released.

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ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE INTERNAL REVENUE SERVICE SPECIFICALLY AGREED TO RELEASE THE INFORMATION IT NOW SEEKS TO WITHHOLD.

The IRS is asking this Court to summarily vacate and remand the decision of the court of appeals requiring release of Phase II check sheets. The IRS seeks this relief even though it expressly agreed to release of this information in the pretrial order. Because of the IRS's voluntary agreement to release the data, certiorari should be denied.

A pretrial order, when agreed to by the parties and entered by the district court, "shall control the subsequent course of the action." Rule 16(e). The parties are bound by their admissions and stipulations included in the pretrial order, and may not contradict its terms. 3 *Moore's Federal Practice*, p. 16-63 (1987). The order may be "modified only to prevent manifest injustice." Rule 16(e).

In this case an agreed order was entered in June, 1983. The pretrial order stated, in the section containing "Admitted Facts", that IRS agreed "to release the Phase II data without taxpayer identification." Pretrial Order. Para. 22, CR 412 at 6. The district court's findings after trial therefore stated that "IRS voluntarily agreed to disclose that [Phase II] data." Finding of Fact No. 17, Petition App., p. 33a. The IRS did not object to this finding.

In addition to voluntarily agreeing to release Phase II data, and admitting this agreement in the Pretrial Order, the IRS actually did release the bulk of the Phase II data on computer dates in July, 1981. CR 412 at 7. The only remaining issue at trial was whether these computer tapes had adequate documentation. The IRS agreed at trial to the inadequacy of this documentation. 825 F.2d at 227-28. Dr. Long requested IRS to provide copies of some Phase II check sheets to assist in interpreting the Phase II tapes IRS had already released.

On appeal in this case, the IRS did not ask to be relieved from its agreement to release Phase II data, nor did it raise any issues concerning the disclosability of the check sheets. IRS simply stated that the trial court's findings "do not deny the Longs access to the [Phase II] check sheets" and the trial court's decision "did not constitute a denial of access to the check sheets." IRS Appellees' Br., No. 84-4117, pp. 30 n. 14 and 31.

Thus, the IRS expressly and voluntarily agreed to release the Phase II check sheet data. The IRS does not state any grounds in the petition for certiorari for equitable relief from its agreement, nor does it allege any "manifest injustice" resulting from the agreement except for

a supposed "administrative burden" in making photocopies.[3] The "burden" of making copies is the same burden that exists in any Freedom of Information Act request. It does not support a finding of "manifest injustice".

Thus, the IRS has no grounds for relief from its voluntary agreement to release Phase II data or for relief from the terms of the pretrial order to which it expressly agreed. The petition for certiorari should be denied.

II. THE IRS PETITION FOR CERTIORARI WAS NOT FILED WITHIN THE JURISDICTIONAL TIME PERIOD ALLOWED BY STATUTE.

The time period for filing a petition for certiorari is 90 days. 28 U.S.C. § 2101(c). The period is jurisdictional and may not be waived, although it is extendable by up to 60 days. *Id.*; Rule 20.3.

In this case the petition was filed on March 30, 1988, after IRS received an extension in February. However, the judgment was entered in August 18, 1987, and the time for filing a petition elapsed on November 16, 1987, in the absence of a timely petition for rehearing of the judgment.

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[3] The IRS greatly exaggerates the photocopying "burden". Petition, p. 7, n.5. The court of appeals pointed this out (596 F.2d at 366):

> [T]he most significant portion of the [expense claimed by the IRS] . . . is the estimate for editing and reproducing all of the 200,000 check sheets. Appellants have indicated, however, that they do not seek all or even most of the check sheets. They are primarily interested in the computer tapes and only seek the check sheets where there is a problem with interpretation of the tapes.

Dr. Long seeks the missing Phase II files not included in the tapes (5, 6 and 7) and a sample of some of the other check sheets to aid in interpretation of the tapes she already received.

The IRS relies (Petition, p. 2) on a rehearing petition filed by Respondents to suspend finality of the August, 1987, judgment and thereby extend the filing deadline, but, as explained below, the Respondents' petition for partial rehearing was in a different appeal and it did not delay the finality of the separate judgment which the IRS seeks to vacate.

A judgment's finality is suspended for purposes of the time period for seeking review when either party files a petition or motion that "seeks an alteration of the rights adjudicated" in the judgment. *FCC v. League of Women Voters*, 468 U.S. 364, 373 n.10 (1984). A party's request for rehearing or a court's action on a separate judgment, even when arising out of the same case, does not affect the finality of the judgment on which review is sought. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 210-11 (1952).

Here, the court of appeals heard two separate appeals, which were consolidated only for purposes of argument at the same time.[4] Appeal No. 84-4117 covered disclosure of the Phase II data on which the IRS seeks a remand. That appeal was from a final judgment in *Long v. IRS*, No. C75-228C (W.D. Wash.), entered in July, 1984. Respondents' petition for partial rehearing in the court of appeals did not seek any alteration in, or have any effect on, the judgment in appeal No. 84-4117. Respondents' rehearing petition was directed solely at the judgment in a different appeal (Nos. 86-3678 and 86-3679), which arose from a

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[4] The clerk simply sent out a notice dated November 14, 1986, stating the "cases will be argued together."

separate 1986 order in the district court,[5] while the IRS appeal (No. 84-4117) was already pending. The rehearing petition raised no issues pertaining to the judgment in the appeal in No. 84-4117.

The Respondents' petition for partial rehearing in 1987 was thus in a separate appeal, with different issues, arising from a different judgment and involving a different defendant. Therefore, it did not extend the time for a petition for certiorari in the IRS case. The IRS petition was not filed within 90 days and the time had already passed when an extension was sought in February, 1988. There is no jurisdiction over the petition because of this delay and the petition should be denied.

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[5] The district court's 1986 ruling was in *Long v. BEA*, No. C78-176C (W.D. Wash.). A final judgment was entered in June, 1983, in the *BEA* case. That 1983 judgment was reversed at 742 F.2d 1173 (9th Cir. 1984). Meanwhile, the district court had a trial in 1983 and entered judgment in 1984 in the *IRS* case, when the *BEA* appeal was pending. The 1986 district court decision involved only the *BEA* case, since the remand was only from the 1984 judgment of the court of appeals reversing the district court's 1983 judgment in the *BEA* case. The *IRS* appeal, filed in 1984, was pending until the judgment in August, 1987. The two cases were consolidated by the district court for hearing purposes only in December, 1982, but the district court's order expressly left the parties, claims and defenses separate and distinct. The files were consolidated and papers often had both headings, leading to some occasional confusion in the clerk's office. For example, the clerk mistakenly entered a judgment naming IRS in 1986, although the IRS case was not before the district court and was then pending on appeal. The parties have recognized the cases are separate, however, and separate judgments were entered in each case at different times.

III. DISCLOSURE OF TCMP STATISTICAL DATA IS NOT AFFECTED BY THE RECENT DECISION IN CHURCH OF SCIENTOLOGY v. IRS.

The IRS argues that disclosure of check sheets "cannot be reconciled with this Court's decision in *Church of Scientology v. IRS* No. 86-472," 101 S.Ct. 271 (1987). *Scientology* affirmed an *en banc* decision of the D.C. Circuit, 792 F.2d 153 (1986), interpreting 26 U.S.C. § 6103(b)(2) to permit disclosure of tax information when identifying information is deleted and the information is also reformulated. 792 F.2d at 153, 160, 163, quoted in 108 S.Ct. at 273. The Court rejected the Church of Scientology's theory that the 1976 Haskell amendment to § 6103(b)(2) permits it to gain access to any particular taxpayer's file containing protected return information by simply deleting identifiers. 101 S.Ct. at 274-76.

This case does not involve the type of request at issue in *Scientology*. The Phase II statistical data at issue here are exactly the sort of statistical data that are intended to be disclosable under the Haskell amendment.

Senator Haskell stated that the purpose of his amendment was to provide for release of "statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers." 122 Cong. Rec. 24012 (1976), quoted at 101 S.Ct. 275. The IRS agrees the Haskell amendment permits release of information in the form of a statistical tabulation or compilation of data that can no longer be associated with any particular taxpayer. IRS *Scientology Brief*, p. 25, No. 86-472. IRS explained that such compilations are different and can be released because "[d]isclosure of data from a sample generated by

IRS does not pose the same privacy concerns as disclosure of a particular taxpayer's return information, even if redacted, in response to a specific request" such as the Church of Scientology's request. *Id.* at 36-37 n. 13.

The Phase II check sheets here are disclosable under the "reformulation" test affirmed in *Scientology.* The check sheets (P.Ex. 41, pt. 2) do not contain contain item-by-item figures from tax returns, but, rather, summaries of information about the sample of business nonfilers in the survey and information about what tax returns should have been filed. The information is thus reformulated under the standard established in *Scientology,* 792 F.2d at 161-62, and affirmed by this Court.

In 1981, Congress expressly confirmed that the court of appeals was correct in 1979 when it ordered IRS disclosure of Phase II TCMP data to Susan Long.[6] When amending § 6103(b)(2) to deal with certain other TCMP data used in developing audit selection formulas, Congress expressed its agreement with the general holding in *Long v. IRS,* 596 F.2d 362 (9th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980). Congress stated some "doubt has been raised . . . whether the disclosure restrictions cover data derived by the Internal Revenue Service from its Taxpayer Compliance Measurement Program (TCMP)." House Report No. 97-201, 97th Cong., 2d Sess. 238-39 (July 24, 1981). The Committee Report, which proposed the 1981 amend-

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[6] When Congress amends a provision of a statute and in the process expresses its acceptance of a prior judicial interpretation of the statute, that interpretation becomes the legislative intent of Congress. *Bob Jones University v. U.S.,* 461 U.S. 574, 601-02 (1983).

ment to § 6103(b)(2), cited and discussed the 1979 *Long* decision in the Ninth Circuit. *Id.* at n. 2. The Committee explained that § 6103(b)(2) was being amended to permit withholding of some TCMP data used in developing audit selection methods, but otherwise the *Long* decision should remain intact (H. Rep. No. 97-201 at 238-39):

> The committee intends that nothing in this provision [§ 6103(b)(2)] be construed to limit disclosure of statistical data or other information (other than of the type that could be used by IRS to determine criteria for selecting returns for examination) to the extent permitted under present law. Thus, any information that is currently made available will continue to be available.

Thus, Congress in 1981 expressly confirmed that TCMP data are disclosable under § 6103(b)(2), so long as the disclosure does not reveal methods used in the IRS audit selection system. Phase II data were never used for development of audit selection methods and Congress expressed its intent to confirm the result in *Long* with respect to release of such TCMP data. H. Report No. 97-201 at 238-39.

Therefore, the IRS is wrong in maintaining that disclosure of these Phase II check sheets is barred by § 6103 and cannot be reconciled with *Scientology*. A remand for reconsideration is not necessary.

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CONCLUSION

The court of appeals did not err in ordering the IRS to comply with its voluntary agreement, as stated in the pretrial order, to release Phase II check sheets to assist in interpretation of the 23 computer tapes that IRS already released. The petition should be denied.

Respectfully submitted,

STEPHEN KOLDEN STRONG
Counsel for Respondents

May 24, 1988